MADJAI SANUSI

v.

PENGARAH IMIGRESEN NEGERI JOHOR & ORS

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CRIMINAL APPEAL NO: 44-9-1998]
18 MAY 1999

CRIMINAL PROCEDURE: *Habeas corpus - Application during trial - Whether should go by way of appeal or revision - Criminal Procedure Code, s. 307, 323 - Whether applicant illegally or improperly detained - Whether order of remand imposed by magistrate lawful - Whether habeas corpus should issue*

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Application during trial - Whether should go by way of appeal or revision - Criminal Procedure Code, s. 307, 323 - Whether applicant illegally or improperly detained - Whether order of remand imposed by magistrate lawful - Whether habeas corpus should issue*

CRIMINAL PROCEDURE: *Consent or sanction - Sanction - Deputy Public Prosecutor sanctioned three out of four charges against accused - Whether insufficient - Whether curable - Criminal Procedure Code, s. 422*

The applicant was tried on four charges under the Immigration Act 1959 in the magistrate's court. The applicant sought for release from custody under a warrant of remand imposed by the magistrate and applied for a writ of *habeas corpus.*

The respondents raised a preliminary objection, *ie*, that the remedy of the writ of *habeas corpus* was not a suitable remedy in the circumstances of the case. Apart from this, the court dealt with the issue on whether the sanction by the prosecution was insufficient as only three out of the four charges the applicant was charged with were sanctioned. It was also alleged that the sanctions were too brief.

Held:

[1] The remedies available to the applicant in the circumstances of the case are: (i) an appeal under s. 307 of the Criminal Procedure Code ('CPC'); (ii) revision under s. 323 CPC; and (iii) the general supervisory and revisionary jurisdiction of the High Court under s. 35 of the Courts of Judicature Act 1964.

[2] To succeed in an application for a writ of *habeas corpus*, the applicant must show that he was illegally or improperly detained. A person cannot be said to be illegally or improperly detained when that person is serving a jail sentence that has been lawfully passed by a court of competent jurisdiction.

[2a] The applicant was detained in custody under a warrant of remand lawfully passed by the magistrate, a court of competent jurisdiction. As such, he could not be said to be illegally or improperly detained.

[3] If the trial court had legal jurisdiction to hear and sentence the arrested person, the only remedy is by way of appeal or by way of revision. No *habeas corpus* can be issued in such cases. In this instance, the order of remand by the magistrate could be tested by way of an appeal or a revision. As the remand was lawful, the applicant was not entitled to be released on an order of *habeas corpus*.

[4] The applicant was charged for two offences under s. 55D of the Immigration Act 1959 and one sanction was issued for these two offences. Although it would be ideal to issue two sanctions for each of these two offences, the issuance of one sanction was not fatal. Further, it was curable under s. 422 of the Criminal Procedure Code as it did not occasion a miscarriage of justice.

[5] A prosecution can be sanctioned without any deep consideration of the particular case. Full consideration is required for consent [*Abdul Hamid v. PP*]. It would be a matter of course for the prosecution to provide a sanction as no "deep consideration of the particular case" was required.

[Preliminary objection allowed.]

Case(s) referred to:

Abdul Hamid v. PP [1956] 22 MLJ 231 ***(refd)***
Au King Chor & Ors v. PP [1985] 1 CLJ 122 ***(refd)***
B Ramachandra Rao v. The State of Orissa AIR 1971 SC 2197 ***(refd)***
Barnardo v. Ford, Gossage's case [1892] AC 326 ***(refd)***
Choy Kok Kuan [1958] 3 MC 200 ***(refd)***
Datuk Harun Haji Idris v. Officer-In-Charge, Pudu Prison [1981] 2 MLJ 72 ***(refd)***
Ex p Corke [1954] 2 All ER 440 ***(refd)***
Ex p Hinds [1961] 1 All ER 707 ***(refd)***
Ex p Howsin [1917] 33 TLR 527 ***(refd)***
Ghulam Sarwar v. Union of India AIR [1967] SC 1337 ***(refd)***
Greene v. Secretary of State for Home Affairs [1941] 3 All ER 388 ***(refd)***
Greene v. Secretary of State for Home Affairs [1942] AC 284 ***(refd)***
Gurdit Singh [1933] 2 MLJ 224 ***(refd)***
Hadi Bandhu v. District Magistrate AIR 1969 SC 43 ***(refd)***

Haji Mohamed Paiman v. PP [1966] 1 MLJ 58 ***(refd)***
Harikisan v. State of Maharashtra AIR [1962] SC 911 ***(refd)***
Jagannath Misra v. State of Orissa AIR [1969] Ori 296 ***(refd)***
Janardhan v. State of Hyderabad, AIR [1951] SC 217 ***(refd)***
Joginder Singh [1984] 2 MLJ 133 ***(refd)***
Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 ***(refd)***
King v. The Commanding Officer of Morn Hill Camp, Winchester, Ex parte Ferguson [1917] 1 KB 176 ***(refd)***
Latif Hussain v. State of J&K, AIR [1971] SC 122 ***(refd)***
Mohd Ikram v. State of Uttar Pradesh, AIR [1964] SC 1625 ***(refd)***
Osman Mat Isa & Ors v. Superintendent of Prison, Alor Setar & Anor [1974] 1 MLJ 189 ***(refd)***
Pitchaykutty v. PP [1961] 27 MLJ 293 ***(refd)***
R v. Bottril, ex p Kuechenmeister [1947] KB 41 ***(refd)***
R v. Cannon Row Police Station Inspector, ex p Brady [1921] 91 LJKB 98 ***(refd)***
R v. Commandant of Knockaloe Camp, ex p Forman [1917] 87 LJKB 43 ***(refd)***
R v. Cowle [1759] 3 Burr 834 ***(refd)***
R v. Governor of Brixton Prison, ex p Sarno [1916] 2 KB 742 ***(refd)***
R v. Governor of Maidstone Prison, ex p Maguire [1925] 2 KB 265 ***(refd)***
R v. Governor of Wormwood Scrubs Prison, ex p Foy [1920] 2 KB 305 ***(refd)***
R v. Halliday [1917] AC 260 ***(refd)***
R v. Heath [1744] 18 State Tr 1 ***(refd)***
R v. Officer Commanding Depot Battalion, RASC Colchester, ex parte Elliott [1949] 1 All ER 373 ***(refd)***
R v. Secretary of State for Home Affairs, ex p Budd [1942] 2 KB 14 ***(refd)***
R v. Secretary of State for Home Affairs, ex p O'Brien [1923] 2 KB 361 ***(refd)***
R v. The Commanding Officer of Morn Hill Camp, ex parte Ferguson [1917] 1 KB 176 ***(refd)***
R v. Vine Street Police Station Superintendent, cx p Liebmann [1916] 1 KB 268 ***(refd)***
Re Abu Kassim [1964] MLJ 12 ***(refd)***
Re Datuk Harun Haji Idris [1981] 1 MLJ 47 ***(refd)***
Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min [1976] 2 MLJ 245 FC ***(refd)***
Re Gurbachan Singh's Application [1967] 1 MLJ 74 ***(refd)***
Re Gurdit Singh [1933] MLJ 224 ***(refd)***
Re Gurbachan Singh's Application [1967] 1 MLJ 74 ***(refd)***
Re Keenan [1972] 1 QB 533 ***(refd)***
Re Mwenya [1960] 1 QB 241 ***(refd)***
Secretary of State for Home Affairs v. O'Brien [1923] AC 603 ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan & Anor [1996] 1 MLJ 261 ***(refd)***
SPN Sharma v. UI, AIR [1968] Del 156 ***(refd)***
State v. Somnath, AIR [1953] Ori 33 ***(refd)***
Yeap Hock Seng v. Minister for Home Affairs, Malaysia [1975] 2 MLJ 279 ***(refd)***
Zainab Othman v. Superintendent of Prison, Pulau Jerajak, Penang [1975] 2 MLJ 221 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 35
Criminal Procedure Code, ss. 129, 307, 323, 363(b), 365(i)(b), 377(b), 422
Federal Constitution, art. 5(1), (2)
Immigration Act 1959, ss. 55D, 56(1)(d), 57
Passport Act 1966, s. 12(1)(f), (2)
Penal Code, ss. 182, 211

Other sources referred to:
Halsbury's Laws of England, 4th edn, vol 11, para 1452, p 768

For the applicant - Md Zahar Ngah; M/s RR Mahendran & Co; M/s. RR Mahendran & Co
For the respondents - Mohamed Abazafree Mohd Abas

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

The applicant, an Indonesian holding a Malaysian permanent resident status, was arrested on 21 June 1998 and on July 1998 he was charged in the magistrate's court in Johor Bahru on four charges under the Immigration Act 1959 (Revised 1997). While the applicant was being tried for those four charges and the trial was on going he was remanded and he was handed to the office in charge of the prison at Jalan Air Molek, Johor Bahru under a warrant of remand that was signed by the magistrate of Johor Bahru. The warrant of remand was extended by the magistrate of Johor Bahru from time to time and the date of remand extended till 24 December 1998. The details of the warrant of remand were amply deposed to by Mr. Mohd Khairy bin Hj Said, the prisons director of Jalan Air Molek, Johor Bahru. That warrant of remand had not been set aside by a court of competent jurisdiction. To all intents and purposes the remand of the applicant was valid in law and in accordance to the law. Everything was done above board. Despite this, the applicant applied for a writ of *habeas corpus*. When the magistrate of Johor Bahru ordered the remand of the applicant it was in the nature of a criminal pronouncement which cannot be challenged by way of a writ of *habeas corpus*. The two obvious ways of challenging the warrant of remand would be by way of an appeal or a revision. Indeed, Mr. Mohamad Abazafree Mohd Abas, learned Federal Counsel, rightly raised a preliminary objection to the effect that the remedy of the writ of *habeas corpus* was not a suitable remedy in the circumstances of the case. It was also his submission that there was no necessity for this court to consider the merits of the case. Mr. Md. Zahar bin

Ngah, learned counsel for the applicant, feebly resisted the preliminary objection and he was indeed magnanimous when he finally agreed that the preliminary objection should stand.

Writ Of Habeas Corpus

Can *habeas corpus* lie in a case as the present where the applicant sought for release from custody under a warrant of remand imposed by the magistrate's court, Johor Bahru? The case of *R v. The Commanding Officer of Morn Hill Camp, ex parte Ferguson* [1917] 1 KB 176 is still good law and it expounds the proposition that *habeas corpus* would not be available to challenge an order made by a court of competent jurisdiction when there exists within the procedural framework the right of appeal to a superior court against such an order. Put in another way, if a court acts without jurisdiction its decision can be challenged in the same way as it would have been challenged if it had acted with jurisdiction and that challenge would be by way of an appeal. The warrant of remand gives the right to the prisons department at Jalan Air Molek, Johor Bahru to put the applicant under its custody and *prima facie* the order of the magistrate does not appear to be without jurisdiction or wholly illegal (*B Ramachandra Rao v. The State of Orissa* AIR 1971 SC 2197, see the decision of Dua J, at p. 2199 of the report). What are the alternative remedies under statute available to the applicant? As I said, there are two. Firstly, under s. 307 of the Criminal Procedure Code (FMS Cap 6) ("CPC") which sets out the procedure for an appeal. Secondly, under s. 323 of the CPC which gives the power to a judge to call for and examine the record of any proceeding for the purpose of a revision. Incidentally, the general supervisory and revisionary jurisdiction of the High Court too can be found in s. 35 of the Courts of Judicature Act 1964 (Act 91) (Revised 1972). For these reasons, the answer to the question would be in the negative.

This judgment would be incomplete and bereft of quality, if the law of *habeas corpus* is not examined by me in extenso. So to fulfil this desire the following analysis is now undertaken.

To begin with, I shall refer to the Supreme Law of the country – our Federal Constitution. Article 5(1) of the Federal Constitution declares proudly that:

> No person shall be deprived of his life or personal liberty save in accordance with law.

Article 5(2) of the Federal Constitution further states:

> Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

and these constitutional guarantees have been upheld by our courts. The then Federal Court in *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors. v. Datuk James Wong Kim Min* [1976] 2 MLJ 245 (FC) aptly said through Lee Hun Hoe CJ (Borneo) at p. 251 of the report:

> One of the functions of the courts is to interpret the law. An inherent part of their function is to see that the executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject. In fact, art. 5(1) of the Constitution guarantees that 'no person shall be deprived of his .. liberty except in accordance with the law.' If this constitutional guarantee is to have any real meaning at all, then it is imperative that the courts should intervene whenever the liberty of the subject is encroached upon not in accordance with the law.

The case of *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 FC lays down the proposition that art. 5(1) of the Federal Constitution covers only substantive provisions of the law and not procedural provisions with the result that any detention order conforming with the former and not the latter would be valid. But the court of Appeal in *Tan Tek Seng v. Suruhanjaya Perkhidmatan & Anor* [1996] 1 MLJ 261 (CA) took a different view and ruled that the expression "law" in art. 5(1) of the Federal Constitution includes procedural law. The Court of Appeal in *Tan Teck Seng* was of the view that (see p. 286 of the report):

> If a particular procedure prescribed by written law is found to be arbitrary or unfair or the procedure adopted in a given case is held to be unfair, then, generally speaking, it must be struck down as offending article 5(1) read with article 8(1)

Next, I shall refer to s. 365 of the CPC which enacts as follows:

> The High Court may whenever it thinks fit direct –
>
> (i) that any person who:
>
> (a) is detained in any prison within the limits of the Federation on a warrant of extradition whether under the (Extradition Ordinance 1958), or the (Commonwealth Fugitive Criminals Act 1967); or
>
> (b) is alleged to be illegally or improperly detained in public or private custody within the limits of the Federation,
>
> be set at liberty;
>
> (ii) that any defendant in custody under a writ of attachment be brought before the Court to be dealt with according to law.

and it sets out the procedure to secure a writ of *habeas corpus*. To succeed in an application for a writ of *habeas corpus*, the applicant must show to this court that he is "illegally or improperly detained". In my judgment, a person cannot be said to be "illegally or improperly detained" when that person is serving a jail sentence that has been lawfully passed by a court of competent jurisdiction (*Re Gurdit Singh* [1933] MLJ 224; *Re Gurbachan Singh's Application* [1967] 1 MLJ 74; *Re Datuk Harun Haji Idris* [1981] 1 MLJ 47; and *Datuk Harun Haji Idris v. Officer-In-Charge, Pudu Prison* [1981] 2 MLJ 72 FC) and I may add, in the context of the present case, where the applicant is detained in custody under a warrant of remand lawfully passed by the magistrate of Johor Bahru – a court of competent jurisdiction, he cannot be said to be "illegally or improperly detained".

Having bandied the term *"habeas corpus"* on numerous occasions, one may ask what is the meaning behind that term. It is a Latin term. It means "to have the body". It is a writ demanding personal liberty. Its full name is *habeas corpus ad subjiciendum* – meaning "that you have the body to submit or answer" (*Ghulam Sarwar v. Union of India AIR* [1967] SC 1337). It demands release from custody. It is a prerogative process to secure the liberty of the subject by affording an effective means of immediate release from unlawful detention. It challenges the validity of an administrative order and the courts are there to protect personal liberty zealously, effectively and expeditiously by *habeas corpus*.

It is trite law that in *habeas corpus* proceedings, the court is only concerned with the legality or otherwise of the detention on the date of the hearing. If it is clear that on the date of the hearing it cannot be said that the aggrieved party has been wrongfully deprived of his personal liberty and his detention is contrary to law, the writ of *habeas corpus* cannot be issued (*Latif Hussain v. State of J&K*, AIR [1971] SC 122). Simply put, the object of the writ is to accord individual protection to one's liberty and to prevent the erosion of the right to be free and move about freely. If the court is not satisfied that the deprivation of the personal liberty of an individual is according to the procedure established by law, that individual is entitled to his liberty. A caveat must be inserted and that is this: the release by way of *habeas corpus* do not bar the relevant authority from arresting the person released and keep him in custody in accordance with the law. A re-arrest after release by way of a writ of *habeas corpus* is the best remedy for the relevant authority to regularise the detention of the individual. The writ proceedings are not designed to interrupt the relevant authority from administering the rigours of the criminal law into motion. In the Malaysian context, once the detainee can show that his detention is illegal or improper, then the court will set the detainee at liberty.

But the court will always be wary and will not simply release detainees under the writ. *Habeas corpus* will not issue if the arrested person is facing an execution of a sentence passed by a court of law – legally competent to do so. If the trial court had legal jurisdiction to hear and sentence the arrested person, the only remedy left is by way of an appeal or by way of a revision and no *habeas corpus* can be issued in such cases (*Janardhan v. State of Hyderabad*, AIR [1951] SC 217). If the accused is properly remanded by a magistrate having jurisdiction, the writ of *habeas corpus* will not lie (*Jagannath Misra v. State of Orissa* AIR [1969] Ori 296). The writ of *habeas corpus* too will not be available to a detainee who has been properly detained by a court martial (*SPN Sharma v. UI*, AIR [1968] Del 156) because the writ cannot examine the alleged irregularities in procedure of a court martial.

To refuse to obey the writ of *habeas corpus* would amount to contempt of court (*Mohd Ikram v. State of Uttar Pradesh*, AIR [1964] SC 1625). Not only that, the case of *State v. Somnath*, AIR [1953] Ori 33 lays down the proposition of law to the effect that any wilful interference with the powers of the High Court in its *habeas corpus* jurisdiction will amount to contempt.

It is germane to take stock of the situation and refer to the passages appearing in *Halsbury's Laws of England*, 4th edn, vol. 11, para. 1452 at p. 768, and there it lucidly said:

> The writ of *habeas corpus ad subjiciendum*, which is commonly known as the writ of *habeas corpus*, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention whether in prison or in private custody. It is a prerogative writ by which the Queen has a right to inquire into the causes for which any of her subjects are deprived of their liberty. By it the High Court and the judges of that court, at the instance of a subject aggrieved, command the production of that subject, and inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released. Release on *habeas corpus* is not, however, an acquittal, nor may the writ be used as a means of appeal.

The writ of *habeas corpus* is simply designed to release a person who is unlawfully detained. Absoolcader J (as he then was) in *Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279 aptly said:

> *Habeas corpus* is a high prerogative writ of summary character for the enforcement of this cherished civil right of personal liberty and entitles the subject of detention to a judicial determination that the administrative order adduced as warrant for the detention is legally valid, in the sense that it is pursuant to valid statutory authority, and to test whether the detention proceedings are, in the words of Frankfurter J in *Estep v. United States* [1946] 327 US 114 'a mere sham, nothing but an empty form'.

Lord Wright in *Greene v. Secretary of State for Home Affairs* [1941] 3 All ER 388, at p. 399-400, observed:

> The inestimable value of the proceedings is that it is the most efficient mode ever devised by any system of law to end unlawful detainments and to secure a speedy release where the circumstances and the law so required.

But the release of a detainee on *habeas corpus* is not considered to be an acquittal (*R v. Officer Commanding Depot Battalion, RASC Colchester, ex parte Elliott* [1949] 1 All ER 373 at 379, DC, per Lord Goddard CJ), nor can the writ be used as an appeal (*Ex p Corke* [1954] 2 All ER 440, [1954] 1 WLR 899, DC; and *Ex p Hinds* [1961] 1 All ER 707, [1961] 1 WLR 325 DC.) All manner of illegal confinement can be effectively and efficaciously be dealt with under the writ of *habeas corpus ad subjiciendum*, directing and commanding the person who detained the prisoner to produce the body of the prisoner to the judge: *ad faciendum, subjiciendum et recipiendum* – to do, submit to, and receive whatsoever the judge awarding such writ shall consider in that behalf. Thus, any illegal detention of a subject which is incapable of legal justification, is the basis of jurisdiction in *habeas corpus* (*Barnardo v. Ford, Gossage's* case [1892] AC 326 at 329 HL). Service of the writ may be effected not only to a person who has the actual custody but it can also be effected against the person who has the constructive custody – meaning the person who has the power and control over the body. The writ of *habeas corpus* is a popular mode of checking the executive, particularly in testing the legality of the detention under emergency legislation (*R v. Cannon Row Police Station Inspector, ex p Brady* [1921] 91 LJKB 98, CA.; *R v. Secretary of State for Home Affairs, ex p O'Brien* [1923] 2 KB 361, CA (on appeal sub nom *Secretary of State for Home Affairs v. O'Brien* [1923] AC 603 HL); *Re Mwenya* [1960] 1 QB 241, [1959] 3 All ER 525 CA; *Re Keenan* [1972] 1 QB 533, [1971] 3 All ER 883 CA; *R v. Governor of Maidstone Prison, ex p Maguire* [1925] 2 KB 265 and on appeal 95 LJK 55 CA*; R v. Vine Street Police Station Superintendent, cx p Liebmann* [1916] 1 KB 268, DC; *R v. Commandant of Knockaloe Camp, ex p Forman* [1917] 87 LJKB 43, DC; *R v. Halliday* [1917] AC 260, HL; *Ex p Howsin* [1917] 33 TLR 527, CA; *R v. Governor of Wormwood Scrubs Prison, ex p Foy* [1920] 2 KB 305; *R v. Governor of Brixton Prison, ex p Sarno* [1916] 2 KB 742; *R v. Secretary of State for Home Affairs, ex p Budd* [1942] 2 KB 14, [1942] 1 All ER 173, CA; *Greene v. Secretary of State for Home Affairs* [1942] AC 284, [1941] 3 All ER 388, HL; and *R v. Bottril, ex p Kuechenmeister* [1947] KB 41, [1946] 2 All ER 43, CA). Marlay CJ in *R v. Heath* [1744] 18 State Tr 1 at 19 aptly state:

> *Habeas corpus* is a writ of right, the highest writ the party can bring.

a And the writ is normally granted *ex debito justitiae* (*R v. Cowle* [1759] 3 Burr 834 at 855 per Lord Mansfield CJ) but it is not as a matter of course that it will be granted (*Ex parte Corke* [1954] 2 All ER 440, [1954] 1 WLR 899 DC). That being the case, the writ may he refused where another remedy lies to effectively test the validity of the restrain. In the context of the present b case, the order of remand by the magistrate can certainly be tested by way of an appeal or a revision. The applicant here has been remanded under the provisions of the CPC and that remand is lawful and, that being the case, the applicant is not entitled to be released on an order of *habeas corpus*. This case is certainly unlike the case of *Re Datuk James Wong Kim Min (supra)* c where the applicant there was detained under provisions that have no legal effect and so the detention was said to be unlawful and the applicant was held entitled to be released forthwith on an order of *habeas corpus*.

It is now trite law that costs will not be accorded to the successful applicant in a writ of *habeas corpus*. The case of *Osman Mat Isa & Ors v.* d *Superintendent of Prison, Alor Setar & Anor* [1974] 1 MLJ 189 is a case in point. In that case there were several applications for *habeas corpus* and only one out of these applications was successful. The others failed. The question that the court had to deal with was the issue of costs – whether the successful applicant or the government should be awarded costs. The court rightly held e that there could be no order as to costs under the CPC and consequently there was no exceptional circumstances to justify a departure from the general rule. In 1975, the then Federal Court finally settled the issue of costs once and for all. In the case of *Zainab Othman v. Superintendent of Prison, Pulau Jerajak, Penang* [1975] 2 MLJ 221 (FC) the then Federal Court in dismissing the f appeal held, *inter alia*, that the learned judge was correct in holding that there could be no order as to costs under the CPC and, on the facts, the then Federal Court also ruled that there were no exceptional circumstances to justify a departure from the ordinary rule.

No matter how wide the scope of the writ of *habeas corpus* is, it can never g be used to challenge the legality or validity of the trial of the accused or the admission or non-admission of evidence by the trial court. That can only be done by way of an appeal (*Re Gurbachan Singh's Application* [1967] 1 MLJ 74).

h These are general propositions of law and they can certainly be used to adjudicate the matter at hand. This is a branch of the law that will continue to develop from time to time.

i

The Sting Of The Preliminary Objection *a*

Mr Mohamed Abazafree Mohd Abas rightly submitted that the High Court has the jurisdiction to issue a writ of *habeas corpus* in the following situations:

(1) when the applicant is unlawfully detained under the Federal Constitution; *b*

(2) when the applicant is illegally detained under the CPC; and

(3) when the applicant is improperly detained under the CPC.

The first situation is governed by art. 5(2) of the Federal Constitution while the second and third situations are governed and controlled by s. 365(i)(b) of *c* the CPC. The applicant deposed in encl. 13 that he could read and understand the Malay language and this was certainly an important factor to be borne in mind. Being conversant in the Malay language – the Bahasa Malaysia, the language of the court, the applicant knew that he was remanded for the purpose of the ongoing trial under the Immigration Act 1959 (Revised 1997). Even *d* the warrant of remand is in Bahasa Malaysia and each extension of the remand is also in Bahasa Malaysia (see exh. "MK1" of encl. 8). As the law now stands, it is imperative that the applicant understands the language of the detention. In *Harikisan v. State of Maharashtra* AIR [1962] SC 911, the court there held that if the grounds of detention were in a language unknown to *e* the detenu, he cannot be said to have knowledge of the grounds. In *Hadi Bandhu v. District Magistrate* AIR [1969] SC 43 the grounds upon which the detenu was detained ran into 14 typed pages and he was orally explained in regard to the contents of those grounds. Unfortunately, the detenu was not supplied with the translation of those grounds in a language understood by him and the court there held that this was improper. *f*

My attention was drawn to the case of *Gurdit Singh* [1933] 2 MLJ 224, a decision of Ephinstone CJ. It was held in that ease that a person is not improperly nor illegally detained when he has been sentenced to imprisonment by a judge of the Supreme Court in a case properly brought before him, and *g* it is not proper for another judge of the Supreme Court to act under s. 363 of the Criminal Procedure Code to decide that question. In that case, the applicant was sentenced to three months' rigorous imprisonment by Mudie J, and he applied to be set at liberty under s. 363(b) of the Criminal Procedure Code. Initially, the applicant was convicted of the offence of bringing a false charge before the magistrate. *h*

The applicant was ordered by the magistrate to be bound over to keep the peace by a bond for a period of six months or in default to undergo six months' simple imprisonment. The applicant appealed and his appeal was heard by Mudie J, who dismissed the appeal against the conviction and set aside *i*

the order requiring the applicant to give security. In *lieu* thereof, Mudie J sentenced the applicant to three months' rigorous imprisonment. Elphinstone CJ dismissed the appeal and his Lordship said at p. 226 of the report:

> I am satisfied that proceedings under section 363 do not apply where the applicant is detained under an order of a judge of the Supreme Court. The application is, therefore, dismissed. I make no order as to costs.

The *King v. The Commanding Officer of Morn Hill Camp, Winchester, Ex parte Ferguson* [1917] 1 KB 176 was a ease of *habeas corpus*. The facts may briefly be stated as follows. An Irishman who had temporarily obtained work in England was brought before a magistrate for failing to comply with an order calling him up from the reserve for permanent service. In pursuance of the powers conferred upon him the magistrate handed the Irishman over to the military authorities as being a person who for the time being was ordinarily resident in Great Britain and as such deemed to be enlisted and transferred to the reserve. The military authorities detained the Irishman and the court held that a writ of *habeas corpus* would not lie to question the decision of the magistrate. Lord Reading CJ at p. 179 of the report aptly said:

> If the jurisdiction exercised by the magistrate is a jurisdiction which has been conferred upon him by the statute, then, notwithstanding that he may have come to a wrong decision on the facts or upon the law, it is clear that his decision cannot questioned by this procedure. In the present case there is no doubt as to the jurisdiction of the magistrate. It is not suggested that he was not the proper tribunal to deal with the case. It is suggested that he came to a wrong conclusion. But if an erroneous decision of a magistrate entitled a party detained by the magistrate's order to come to this Court for a writ of *habeas corpus*, that writ would furnish a ready means of appealing to this Court from every decision of a magistrate ordering the detention of an offender. If there were no means of questioning a magistrate's order, there might be some ground for invoking the assistance of this Court in the way chosen in this case, but there is a well-known procedure by way of special case whereby the decisions of magistrates can be inquired into. In my opinion we have no jurisdiction to interfere in such a case as the present.

Darling J too in the same case at p. 180 echoed the same sentiment and this was what he said:

> The question whether a person comes within those words is a question of fact for the magistrate to decide. No objection has been taken or could have been taken to his jurisdiction. He had ample jurisdiction to decide the question. Whether he decided it rightly or wrongly we are not called upon to determine. In fact he decided the question against the prosecutor, who then applied for a writ of *habeas corpus*. If the magistrate had had no jurisdiction in the matter, this writ might have been an available remedy; but such writs are not to be obtained by confusing jurisdiction with merits. The writ of *habeas corpus* does

> not lie wherever a Court decides wrongly. It lies where a person is detained without justification. In the present case the justification is the decision of a magistrate. If a magistrate comes to a wrong decision in fact or in law he may be asked to state a case; if he refuses he may be ordered to do so. The prosecutor therefore had a remedy. He desired a more expeditious remedy, but that is no reason why this Court should be permitted to enlarge its jurisdiction. The Court is not to be called upon to entertain appeals from all magistrates who decide wrongly as soon as the decision is given.

These passages from these two learned judges in that case when applied to the factual matrix of the present case would put to nought the writ of *habeas corpus* sought by the applicant. The trial of the applicant is on going. The progress of the trial has been hampered by the applicant's application for a writ of *habeas corpus*. The magistrate merely remanded the applicant pending disposal of the trial proper and each extension of the remand bears the legal authority of the magistrate. The administration of criminal justice in this country would come to a standstill if the courts were to entertain an application of this nature. Abdul Hamid Omar Acting LP in *Au King Chor & Ors v. PP* [1985] 1 CLJ 122; [1985] 1 MLJ 216, 219 FC sounded a stern warning, which warning should be echoed here:

> Assuming for a moment that this is not what is intended by the legislature we can only foresee an intolerable position emerging and the trial Court shall have to accede to numerous requests for postponements to enable each party to appeal against an order made in the course of the trial whereby the entire progress of the trial would be frustrated.

The applicant was not illegally or improperly detained in the prison. I was satisfied that the detention was lawful and it was my judgment that the applicant should not be set at liberty. The writ of *habeas corpus* must fall like a deck of cards. It was a fruitless attempt to frustrate the progress of the trial. The sting of the preliminary objection when seen in its proper perspective would render the present application a waste of judicial time. Practising lawyers must be familiar with the procedures governing the trial of criminal cases. A good criminal lawyer will not file the present application. But good criminal lawyers are hard to come by these days.

For the reasons adumbrated above, the preliminary objection was allowed and, consequently, the upshot of it was that encl. 2 was struck off by me forthwith.

Addendum

Only one issue was ventilated in encl. 2 and that was in relation to the sanction issued by the prosecution. An argument was advanced to the effect that the sanction that was issued by the prosecution was insufficient. It was said that only three sanctions were issued by the deputy public prosecutor whereas the

applicant faced four charges. The sanctions too were said to be too brief and, consequently, it was said that the prosecution did not take into account the facts and the information surrounding the case before issuing those sanctions. All these can be seen in encl. 13 and surprisingly these points were not advanced by the applicant before me at all.

I have since examined the relevant affidavits especially the affidavit of Mohamed Fauzi bin Ismail that was affirmed on 24 December 1998 and filed on the same date as reflected in encl. 5 which clearly showed the following:

(1) Datin Amelia Tee Hong Geok bt Abdullah, a senior deputy public prosecutor, issued a conduct of prosecutions in court dated 3 April 1998 to Mohamed Fauzi bin Ismail under s. 377(b) of the CPC.

(2) Vimala a/p Arunasalam, a deputy public prosecutor, issued three sanctions and these three sanctions were dated 29 June 1998 for the following offences:

(a) for an offence under s. 12(1)(f) of the Passport Act 1966 (Revised 1997) and punishable under s. 12(2) of the same Act that was said to have been committed by the applicant on 19 June 1998;

(b) For an offence under s. 56(1)(d) of the Immigration Act 1959 (Revised 1997) and punishable under s. 57 of the same Act that was said to have been committed by the applicant on 19 June 1998;

(c) For an offence under s. 55D of the Immigration Act 1959 (Revised 1997) and punishable under the same section of the same Act that was said to have been committed by the applicant on 19 June 1998.

The applicant was charged for two offences under s. 55D of the Immigration Act 1959 (Revised 1997) and those two offences were punishable under the same section of the same Act. Those two offences were said to be committed on "19 June 1998 at about 9.30pm at a house with an address at no: 48, Jalan Keris 6, Taman Putri Wangsa, Ulu Tiram, in the district of Johor Bahru, in the State of Johore". No wonder there was only one sanction for these two offences and, in my judgment, although it would be ideal to issue two sanctions for each of these two offences, the issuance of one sanction for these two offences was not fatal.

The applicant was charged for an offence under s. 12(1)(f) of the Passport Act 1966 (Revised 1997) and punishable under s. 12(2) of the same Act and a sanction was issued under it. The applicant too was charged for an offence under s. 56(1)(d) of the Immigration Act 1959 (Revised 1997) and a sanction was issued under it. These sanctions were perfectly in order and I have no quarrel with them.

Why are sanctions necessary? Sanctions are required before prosecution to ensure that prosecutions under certain sections of the law have been instituted only after due consideration. It is correct to say and I so say that where the sanction of the public prosecutor is necessary for the prosecution of an offence and the facts constituting the offence are not referred to on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were indeed placed before the sanctioning authority, unless the court can make the necessary inference, from the material in the record that that had been done (*Choy Kok Kuan* [1958] 3 MC 200). But judges adopt different approaches to the same problems. Thus, in *Re Abu Kassim* [1964] MLJ 12, the court there held that a want of sanction rendered the trial a nullity and the court did not even consider whether it had occasioned a miscarriage of justice. In *Haji Mohamed Paiman v. PP* [1966] 1 MLJ 58, the court held that since the sanction was not obtained when the accused was charged in court, the trial was a nullity. In *Pitchaykutty v. PP* [1961] 27 MLJ 293, the accused was charged under s. 182 of the Penal Code but no sanction was obtained and the court held that the absence of a sanction under the equivalent section to s. 129 of the CPC rendered the proceedings before the magistrate null and void if the want of sanction occasioned a miscarriage of justice. In *Joginder Singh* [1984] 2 MLJ 133, the accused was prosecuted under s. 211 of the Penal Code but no sanction was obtained. The court held that it was curable under s. 422 of the CPC as it did not occasion a miscarriage of justice. It is germane to reproduce s. 422 of the CPC:

> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of -
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence.
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

and to me it is an all encompassing provision which fits the peg of many cases so long as it has not occasioned a failure of justice. Section 422 of the CPC when applied to the present case would save the day for the respondents and I have no qualms in applying it.

There is a marked difference between a sanction and a consent. Smith J in *Abdul Hamid v. PP* [1956] 22 MLJ 231 explained it aptly at p. 232 of the report:

> There is an essential difference to my mind between a sanction and a consent. A prosecution can be sanctioned without any deep consideration of the particular case: full consideration is required for consent since 'Consent' is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side (Stroud 3rd Edition. Vol. 1 page 582).

And continuing on the same page, Smith J said:

> The sanction was therefore no evidence of consent.

It would be a matter of course for the prosecution to provide a sanction as no "deep consideration of the particular case" is required and this is the feature that marks this case apart from the other cases.